

# Journal of Air Law and Commerce

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Volume 38 | Issue 4

Article 2

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1972

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### Recommended Citation

Robert M. Lichtman, *Regularization of the Legal Status of International Air Charter Services*, 38 J. AIR L. & COM. 441 (1972)  
<https://scholar.smu.edu/jalc/vol38/iss4/2>

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## REGULARIZATION OF THE LEGAL STATUS OF INTERNATIONAL AIR CHARTER SERVICES

ROBERT M. LICHTMAN\*

*Although non-scheduled air transportation plays an integral part in international air transportation, charter services are subject to diverse regulations and restrictions imposed by individual governments. In this article Mr. Lichtman urges that the increasing volume of non-scheduled air travel and its growing economic importance necessitates the regularization of the legal status of international charter air transportation. The author suggests that a balanced system be developed in which charter services, as well as scheduled services, obtain secured status for continued development through the use of bilateral agreements.*

THE DEVELOPMENT of large-scale international air charter services and a separate class of charter-only airlines was doubtless unforeseen when the Chicago Convention on International Civil Aviation<sup>1</sup> was opened for signature on December 7, 1944. While the Convention does touch the subject of non-scheduled air transportation and includes a provision permitting traffic stops on non-scheduled international revenue flights, subject to the right of each state to prescribe "regulations, conditions or limitations as it may consider desirable,"<sup>2</sup> a more important concern of the Convention was the inclusion of prohibition against scheduled international air services over or into any state "except with the special permission or other authorization of the [s]tate . . . ."<sup>3</sup> This provision requiring special permission from a state was "the legal expression of

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<sup>1</sup> 61 Stat. 1180. The Chicago Convention became effective on April 4, 1947.

<sup>2</sup> *Id.*, Article 5(2).

<sup>3</sup> *Id.*, Article 6.

the impasse reached by the Conference in its search for a multi-lateral exchange of commercial rights in scheduled international air transport."<sup>4</sup>

The preoccupation with scheduled services continued during the early postwar years, when the attention of governments was focused upon the exchange of scheduled air transport rights. Following the Bermuda Conference in 1946, a widespread system of bilateral agreements was developed regulating international scheduled services. But, with very limited exceptions, no effort was made to secure comparable governmental agreements covering non-scheduled air services.<sup>5</sup> Non-scheduled services were simply governed by the "regulations, conditions or limitations" that individual nations elected to impose. This disparity of constraints reflected the lack of importance of non-scheduled traffic at that time.

In 1972, however, non-scheduled air transportation in the form of charterflights "has come of age." Charter passengers now constitute a significant portion of the traffic in numerous international air markets; charter-only airlines carry a large percentage of this traffic.<sup>6</sup> Charter services have become "a most valuable component of the international air transportation system . . . ." Yet, for the most part, charter air services remain subject to a hodgepodge of unilaterally-imposed and widely-differing governmental regulations and restrictions. For example, in a majority of cases, permission for charter flights must be sought in advance on a flight-by-flight basis. As a result, there is no secure legal foundation for the continued existence and development of international charter services and charter airlines; charters remain in constant jeopardy due to the presence of hostile economic forces.<sup>8</sup> Because of the volume of charter travel today, its widespread and growing acceptance by the

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<sup>4</sup> BIN CHENG, *THE LAW OF INTERNATIONAL AIR TRANSPORT* 173 (1962) [hereinafter BIN CHENG].

<sup>5</sup> The exceptions are the Paris Agreement and the United Kingdom, France/Switzerland agreements. See text at notes 38-45 *infra*.

<sup>6</sup> See notes 27-28 *infra*.

<sup>7</sup> Statement of International Air Transportation Policy of the United States, approved by the President, 6 Weekly Compilation of Presidential Documents 804 n.2 (1970).

<sup>8</sup> *E.g.*, INTERNATIONAL AIR TRANSPORT ASSOCIATION, *AN ANALYSIS ON INTERNATIONAL AIR CHARTERS UNDERTAKEN AT THE REQUEST OF THE EUROPEAN CIVIL AVIATION CONFERENCE* (1972); see also Letter of Transmittal from Knut Hamerskjold, Director General of IATA to Henrik Winberg, President of ECAC, February 11, 1972.

traveling public and the sizable economic and cultural benefits it affords, the necessity for regularizing the legal status of international charter air transportation is clear and urgent.

Subsequent to the preparation of this article, a vital first step toward regularizing the status of international charter air service was achieved with the signing on October 17, 1972 of a Memorandum of Understanding between the United States and Belgium. This agreement will govern passenger charter services between the two countries during the three-year period beginning January 1, 1973. In view of its unprecedented character, the text of the Memorandum of Understanding is set forth in an appendix and a post-script section has been added to the article summarizing the principal features of the new agreement.<sup>9</sup>

## I. THE DEVELOPMENT OF CHARTER TRAFFIC AND CHARTER AIRLINES

### A. *The Origins of Charter Air Services*

Prior to World War II, charter flights were infrequent and economically unimportant. In some cases the charter flights were performed by scheduled airlines as a type of special service. As one commentator recounts:

As soon as the regular airlines were established, they were called upon to perform special services for which aircraft were particularly suitable. The one classic service was the transportation of great sums of money and gold, which governments during periods of political crisis greatly needed. Other types of special flights were rescue expeditions such as the search of the ABA aircraft 'Upplant,' under charter to the Swedish Government, for the airship 'Italia' lost in the Polar Region. The passenger group market was also tried by several airlines. The Lufthansa sought traffic among the passengers on the Norddeutscher Lloyd vessels approaching Hamburg and the Imperial Airways sought a similar clientele on board the Cunard vessels approaching Cherbourg. Instances of affinity groups chartering aircraft for travel to certain points are also reported; thus a German yachting association . . . in 1933 arranged for its transportation to Copenhagen. The Zeppelin airships in late 1929 settled for a policy of chartering the ship to sightseers taking

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<sup>9</sup> See Appendix II. Certain modifications were made in the article to account for intervening events.

as many as forty on the pleasure cruises over the Alps and even as far away as Spitzbergen.<sup>10</sup>

In this regard, the Civil Aeronautics Act of 1938<sup>11</sup> provided for the performance by scheduled airlines of "charter trips . . . or any other special service."<sup>12</sup>

In other cases, fixed-base and other miscellaneous operators, who utilized small aircraft, provided charter transportation among a wide range of services. When the Civil Aeronautics Act of 1938 was enacted, these operators were deemed so inconsequential that they were simply exempted from the licensing requirements of the Act. The Civil Aeronautics Board later stated:

When the non-scheduled exemption order was adopted in 1938, non-scheduled air transportation was of limited economic significance. Although there were many such operators, most of them were engaged in air transportation only to a limited degree, chiefly as a byproduct of other air services—for example, the sale and servicing of aircraft and accessories, aerial photography, flight instruction, aerial advertising, crop dusting, and the operation of airports.<sup>13</sup>

The chain of events set in motion by World War II, however, greatly altered this state of affairs. A 1955 CAB decision summarized the developments in the United States:

Conditions at the end of World War II, however, brought about a rapid expansion in the activities of the irregular carriers. First, the civilian demand for air travel increased tremendously after the war, and the certificated carriers, whose activities were severely limited during the war period, were faced with the problem of expanding their operations to meet the growing demand for air service. Second, a substantial number of veterans trained in the techniques of aviation sought to enter the field of aviation as independent operators. Their entry into the field was facilitated by the availability of surplus military aircraft, mostly C-46's and C-47's, which could be leased or purchased at a relatively small cost. Equipped with the larger aircraft, the irregulars sought to satisfy the enlarged demand which the certificated carriers were unable to meet. The traveling public readily accepted and patronized the rapidly ex-

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<sup>10</sup> C. SUNDBERG, AIR CHARTER 11 (1961). (citations omitted) [hereinafter cited as Sundberg].

<sup>11</sup> 52 Stat. 973 (1938).

<sup>12</sup> Civil Aeronautics Act of 1938, § 401(f).

<sup>13</sup> *Investigation of Nonscheduled Air Services*, 6 C.A.B. 1049, 1051 (1946).

panding services of the irregulars to the point that they now constitute an important segment of the air transportation industry.<sup>14</sup>

Developments in Europe followed a similar pattern, as Sundberg describes:

Already one year after the European Armistice there were about thirty different French irregulars flying mainly between North Africa, France and Great Britain. . . . The traffic consisted to a large extent of air freight, mainly emergency and high-cost goods and perishable agricultural produce. Besides this, a great variety of passenger traffic was taken care of, the carriers being able to benefit from the natural desire of people to travel after the compulsory isolation of the war. Much of the traffic was of a directly military nature or, at least, owed its origin to military dispositions as in the case of the flying of furlough personnel and dependents of the members of the armies of occupation. Another traffic offered in war-stricken Europe was the lift of emigrants to overseas destinations. It was found by officials in charge of emigration affairs to be more advantageous to fly certain categories of emigrants to their destination than to send them by ship.<sup>15</sup>

Although marked by growth in the early post-war years, the ranks of the non-scheduled (irregular) carriers suffered substantial attrition in the 1950's due to the rigors of competition and to regulatory restraints. When, in 1948, the CAB closed the class of large irregular carriers to which it would grant exemption authority, 142 carriers had been issued such authority.<sup>16</sup> By 1955, however, the Board reported that only "some fifty irregular air carriers" were then operating.<sup>17</sup> In 1959, at the conclusion of a licensing proceeding, it found twenty-six applicants qualified to receive authorization as "supplemental" air carriers.<sup>18</sup>

In Europe, a comparable diminution in the class of irregular carriers apparently occurred, and, as in the United States, a few of these carriers gained entry to the scheduled carrier class.<sup>19</sup>

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<sup>14</sup> *Large Irregular Air Carrier Investigation*, 22 C.A.B. 838, 858 (1955). See *Large Irregular Carriers, Exemptions*, 11 C.A.B. 609-612-13 (1950).

<sup>15</sup> SUNDBERG at 25 (footnotes omitted).

<sup>16</sup> *Large Irregular Air Carrier Investigation*, 22 C.A.B. 838, 891 (1955).

<sup>17</sup> *Id.* at 858.

<sup>18</sup> *Large Irregular Air Carrier Investigation*, 28 C.A.B. 224, 227 (1959). (The number of United States supplementals today is far less—about nine).

<sup>19</sup> SUNDBERG at 27-32.

### B. *The Expansion of Charter Services in the 1960's*

The 1960's marked the emergence of charter airlines in their present form and the growth of sizable charter traffic across the Atlantic and within Europe.

In the United States, the Congress in 1962 amended the Federal Aviation Act of 1958<sup>20</sup> to establish supplementals as a permanent class of air carrier authorized to perform "charter trips" in air transportation.<sup>21</sup> Pursuant to the new legislation, the CAB conducted extended licensing proceedings that resulted in the award of certificate authority to supplemental carriers in both domestic and international markets.<sup>22</sup> In 1968, the Act was amended to authorize expressly the operation of "inclusive tour charter trips" (ITC's) by supplemental airlines.<sup>23</sup> The Congress stated that the supplementals "have actively promoted the airline charter business to the point where it is a growing means of travel for American citizens" and that the "[s]upplementals are a permanent and integral part of the national air transportation system . . . ."<sup>24</sup>

In a parallel development, the CAB in 1963 granted for the first time a foreign air carrier permit authorizing charter-only air services.<sup>25</sup> The recipient was Caledonian Airways, a United Kingdom independent carrier. This was the forerunner of many of the charter-only authorizations—now approximating thirty-five—issued to airlines of the United Kingdom, Canada, Spain, Germany, Denmark, Yugoslavia, the Netherlands, Finland and others.<sup>26</sup>

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<sup>20</sup> Public Law 87-528, 76 Stat. 143 (1962).

<sup>21</sup> Federal Aviation Act of 1958 § 101(34), § 401(d)(3), 49 U.S.C. § 1301(34), § 1371(d)(3) (1970).

<sup>22</sup> *Transatlantic Charter Investigation*, 40 C.A.B. 233 (1964); *Supplemental Air Service Proceeding*, CAB Order E-23350 (March 14, 1966); *Reopened Transatlantic Charter Investigation*, CAB Order E-24242 (September 30, 1966).

<sup>23</sup> Public Law 90-514, 82 Stat. 867 (1968).

<sup>24</sup> S. REP. NO. 1354, 90th Cong., 2d Sess., p. 4 (1968).

<sup>25</sup> Caledonian Airways (Prestwick) Ltd., 38 C.A.B. 501 (1963).

<sup>26</sup> E.g., Laker Airways, Ltd., CAB Order 69-12-60 (December 15, 1969) (United Kingdom); Wardair Canada Ltd., CAB Order E-26137 (December 19, 1967) (Canada); Spantax, S.A. CAB Order 70-1-138 (January 29, 1970) (Spain); Condor Flugdienst, G.m.b.H., CAB Order E-26147 (December 21, 1967) (Germany); Sterling Airways A/S, CAB Order 70-12-26 (December 7, 1970) (Denmark); Adria Airways, CAB Order E-22117 (May 3, 1965) (Yugoslavia); Martin's Luchvervoer Maatschappij N.V., CAB Order E-26146 (December 21, 1967) (The Netherlands); Aero O/Y (Finnair), CAB Order 68-10-107 (October 21, 1968) (Finland).

International charter traffic carried by both scheduled and charter airlines experienced explosive growth throughout the 1960's. From a modest base of less than 250,000 passengers in 1961, international passenger charter traffic to and from the United States by all classes of carriers reached approximately 2.5 million passengers in 1970. The vast amount of this traffic—more than seventy-five per cent—was carried in the transatlantic market. In 1961 transatlantic charter passengers to and from the United States numbered 204,000: approximately eleven per cent of the total United States transatlantic traffic. By 1970 the charter figure had climbed to 1.91 million passengers, accounting for twenty-three per cent of all transatlantic passengers to or from the United States. American and foreign airlines, both charter and scheduled, have substantially participated in this growing charter market. Of the 10,450 transatlantic charter flights to and from the United States in 1970, American supplementals performed 37.5 per cent, United States route carriers 16.8 per cent, foreign route carriers 22.3 per cent, and foreign charter carriers 23.4 per cent.<sup>27</sup>

During much of the same period, intra-Europe charter traffic, mostly in the form of single-stop inclusive tour charters, likewise experienced dramatic growth. Revenue passenger-miles flown in intra-Europe non-scheduled services increased nearly sixfold between 1963 and 1969. In 1967, twenty-four per cent of all passenger-miles in the region were performed on non-scheduled services. And 11.2 million passengers were transported on such services in 1969. Of these passengers, nearly ninety per cent—almost ten million—were carried on ITC's, as compared to an estimated two million ITC passengers in 1963. The main flow of intra-Europe charter traffic originates in northern Europe (principally, the United Kingdom, West Germany and Scandinavia) and is destined for points in the Mediterranean area. The extent of this traffic is such that the number of United Kingdom residents who utilized ITC's to the Mediterranean area in 1970 was equivalent to four per cent of the total of the population of the United Kingdom. Approximately forty charter airlines (including a number of subsidiaries of

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<sup>27</sup> See CAB UNITED STATES INTERNATIONAL AIR CHARTER PASSENGER MOVEMENTS, 1968-1970 (October 1971); *Transatlantic Charter Investigation*, *supra*, 40 C.A.B. 233, 294; IATA Reports; CAB THE MAGNITUDE OF THE SUPPLEMENTAL AIR CARRIER OPERATIONS 28-29, 54-57 (September 1972).



scheduled airlines) carrying the flags of thirteen European countries participate in the intra-Europe charter market.<sup>28</sup>

The economic benefits to the destination countries of tourism of this magnitude are, of course, very sizable. The United States Department of Commerce has estimated that the average daily expenditure, exclusive of transportation costs, of United States residents traveling in Europe in 1969—many of them transatlantic passengers—was seventeen dollars; their average length of stay was twenty-eight days.<sup>29</sup> While the expenditures of travelers on intra-Europe ITC services are probably considerably less, the number of these travelers is substantially greater. Spain, is the country of destination for more than half of the intra-Europe ITC traffic,<sup>30</sup> and is perhaps the prime example of the economic rewards that charter tourism can provide.

## II. GOVERNMENTAL REGULATION OF INTERNATIONAL CHARTER AIR SERVICES

Notwithstanding the size and economic importance of international air charter traffic today, nations have hardly begun to agree on a system of agreements among nations of the kind that has served to provide protection and assured conditions of operation for international scheduled services. While numerous bilateral agreements are in effect covering scheduled air transportation, there are virtually no bilateral agreements that are directed to charter services. The Paris Agreement of 1956, the only multilateral agreement aimed at regularizing the treatment of non-scheduled services, is extremely limited in both scope and effect. As a consequence, international charter flights are normally subject to unilaterally-imposed regulatory requirements that vary widely among countries. For example, charters authorized under the laws of one nation are often denied entry by other nations. Moreover, in many countries,

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<sup>28</sup> McDONNELL-DOUGLAS CORPORATION, *THE EUROPEAN CHARTER AIRLINES* (November 1970); Report of the Committee of Inquiry Into Civil Air Transport, *BRITISH AIR TRANSPORT IN THE SEVENTIES*, 58-59 (May 1969) (hereinafter cited as Edwards Report); *Tourist Migrations and Population*, ITA Bulletin No. 6, at 119-22 (Feb. 1972).

<sup>29</sup> *Forecast Charter Potential Under Updated Rules and an Inquiry into the Matter of Impairment of Scheduled Services*, Report to National Air Carrier Association, Appendix 28.

<sup>30</sup> *The European Charter Airlines*; see note 28 *supra* at 16.

written charter regulations are rudimentary and vest in administrative officials discretion to decide on a flight-by-flight basis whether traffic rights for charters will be granted.

#### *A. The Legacy of the Chicago Convention*

This unsatisfactory state of affairs can in part be traced to the Chicago Convention of 1944. The Convention provides in article 5(2) that aircraft engaged in non-scheduled carriage of passengers, cargo or mail for revenue shall "have the privilege of taking on or discharging passengers, cargo, or mail subject to the right of any [s]tate where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable."<sup>31</sup> "As a result," Sundberg states, "governments felt that they could regulate the entry of foreign air carriers almost at will."<sup>32</sup> In 1952, the ICAO Council expressed the view that this provision should not be "exercised in such a way as to render this important form of air transport impossible or non-effective."<sup>33</sup> Nonetheless, Israel, a signatory to the Chicago Convention, bans all passenger charter flights. Other countries have also imposed severe restrictions upon charter services.

In addition to these severe restrictions, another source of difficulty is the failure of the Chicago Convention to define "scheduled" and "non-scheduled" services, and the subsequent inability of governments to arrive at a mutually satisfactory definition. In 1952, ICAO attempted a definition of "scheduled international air service"—and by exclusion a definition of "non-scheduled" service. This definition stressed that scheduled services are "open to use by members of the public" and that they are "so regular or frequent that they constitute a recognizably systematic series."<sup>34</sup> Since 1949, IATA traffic conferences have wrestled with defining charter eligibility in a series of versions of IATA Resolution 045.<sup>35</sup> And, beginning in the early 1950's, the Civil Aeronautics Board has been almost continuously

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<sup>31</sup> Under the first paragraph of Article 5, which deals with *non-traffic* stops on non-scheduled flights, the Convention affords the "right" to make these stops "without the necessity of obtaining prior permission . . . ."

<sup>32</sup> See note 10 *supra* at 75.

<sup>33</sup> ICAO Doc. 7278-C/841, May 10, 1952, at 12, as quoted in BIN CHENG at 197.

<sup>34</sup> ICAO Doc. 7278-C/841, May 10, 1952 at 3-6, as quoted in BIN CHENG at 174-77.

<sup>35</sup> See SUNDBERG at 102-08.

engaged in revision of its charter rules.<sup>36</sup> Illustrative of the problems of definition are inclusive tour charters, a recognized charter mode, that are customarily open to the general public and conducted on a regular basis. Accordingly, inclusive tour charters conflict with the two major ICAO indexes of scheduled service. Moreover, the affinity rules, which for years have been used to exclude the general public from charter flights, are now widely (and accurately) criticized as discriminatory.<sup>37</sup>

### *B. Early Bilaterals and the Paris Agreement*

The United Kingdom in the early 1950's entered into bilateral agreements relating to non-scheduled air services with France and Switzerland. The agreements with both countries dispensed with the requirement of prior approval with respect to flights not performed over scheduled air routes between the countries to the agreement, and, in the case of flights over scheduled routes, air taxi operations and "single flights"—*i.e.*, flights performed by any given operator less frequently than once in any thirty-day period (United Kingdom-France) or ten-day period (United Kingdom-Switzerland). With respect to charter flights not coming within these categories, the United Kingdom-France agreement dispensed with prior permission only in the case of single entity charters (*i.e.*, for the charterer's own use) on which no space was resold by the charterer, and the United Kingdom-Switzerland agreement not at all.<sup>38</sup> These agreements thus failed to remove the prior approval requirement either for affinity charters or ITC's, which together constitute the vast bulk of the charter market. Moreover, the agreements were short-lived since the United Kingdom terminated them following its ratification of the Paris Agreement of 1956.<sup>39</sup>

The Paris Agreement<sup>40</sup> has been ratified by almost all of the

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<sup>36</sup> See Goldklang, *Transatlantic Charter Policy—A Study in Airline Regulation*, 28 J. AIR L. & COM. 99 (1962); Benoff, *Supplemental Air Carriers*, 43 S. CAL. L. REV. 791, 797-808 (1970).

<sup>37</sup> See, *e.g.*, CAB Advance Notice of Proposed Rule Making (SPDR-22), Docket 23055, January 29, 1971.

<sup>38</sup> BIN CHENG at 200-01. The latter agreement provided as to a series of charters for a society or association (*i.e.*, affinity-type charters) that prior permission shall not be refused "without good reason." *Id.*

<sup>39</sup> BIN CHENG at 199, 206.

<sup>40</sup> Formally styled the Multilateral Agreement on Commercial Rights for Non-Scheduled Services in Europe. See, generally, Weld, *Some Notes on the Multi-*

European states. Only member states of the European Civil Aviation Conference may become parties to it; the agreement is geographically limited to the metropolitan territories of the contracting states.<sup>41</sup> The preamble of the agreement states "the policy of each of the [s]tates . . . that aircraft engaged in non-scheduled commercial flights within Europe *which do not harm their scheduled services* may be freely admitted to their territories for the purpose of taking on or discharging traffic . . . ."<sup>42</sup>

Under the Paris Agreement, the contracting states agree to admit specific types of non-scheduled revenue traffic "without the imposition of the 'regulations, conditions and limitations' provided for" in article 5(2) of the Chicago Convention.<sup>43</sup> The categories of flights covered are humanitarian or emergency flights, air taxi flights (not more than six passengers) of "occasional character," single entity charters on which no space is resold and single flights (less than one flight per month between any given pair of points by any operator or group of operators). In addition, all-cargo flights and passenger flights between regions that "have no reasonably direct connection by scheduled air services" are covered, provided that *any* party to the Agreement may require the flights to be abandoned "if it deems that [they] are harmful to the interests of its scheduled air services operating in the territories to which this Agreement applies."<sup>44</sup>

With respect to all other types of non-scheduled flights, which means virtually all ITC's and affinity charters, the parties are free to impose prior approval requirements, among other "regulations, conditions, or limitations."<sup>45</sup> In short, the Agreement does not affect the vast majority of charter flights within Europe and is totally inapplicable to charter flights serving points outside of Europe.

ECAC, which had its origin in the 1954 Strasbourg Conference that led to the Paris Agreement, has adopted over a period of years

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*lateral Agreement on Commercial Rights of Non-Scheduled Air Services in Europe*, 23 J. AIR L. & COM. 180 (1956).

<sup>41</sup> Paris Agreement, Articles 1, 11.

<sup>42</sup> See note 40 *supra* (emphasis added).

<sup>43</sup> Paris Agreement, Article 2.

<sup>44</sup> *Id.*, Article 2(2).

<sup>45</sup> *Id.*, Article 3 of the Agreement requires that parties adopt published regulations, and also provides for short-notice applications for approval when not more than four flights are involved.

a number of recommendations or policy statements regarding charter services. While ECAC policy has aimed at encouraging charter services within Europe,<sup>46</sup> it has been restrictive with respect to transatlantic charters.<sup>47</sup> Its recommendations have frequently been followed by individual ECAC member countries; but they have not been formalized in international agreements.

### *C. Unilateral Charter Policies of Today*

With international charter traffic subject to unilaterally-imposed "regulations, conditions, or limitations," a wide variety of regulatory policies affecting charter services presently exists. These regulations are sometimes permissive, but more often quite restrictive.

The United States grants unlimited on-route charter authority to foreign route carriers under their foreign air carrier permits, notwithstanding that all bilateral agreements between the United States and other nations extend only to scheduled air services and that, in some cases, no bilateral agreement exists.<sup>48</sup> No requirement of prior approval exists with respect to on-route charters.<sup>49</sup> Foreign route carriers, however, are required to obtain prior approval of their off-route charter flights.<sup>50</sup> In addition, foreign charter airlines receive long-term permits that do not require prior approval of individual flights.<sup>51</sup> The permits of foreign charter airlines contain an uplift-ratio restriction that requires that a substantial percentage of the carrier's flights (approaching one-half as the volume of

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<sup>46</sup> E.g., Recommendation No. 6, Fourth Session of ECAC, Strasbourg (July 1961) concerning intra-Europe ITC's.

<sup>47</sup> E.g., Recommendation Nos. 7, 8 and 9, Second Intermediate Session of ECAC, Paris (July 1969) regarding "control" of transatlantic ITC's and affinity charters.

<sup>48</sup> See Japan Airlines, Foreign Air Carrier Permit, CAB Order E-24295 (October 14, 1966).

<sup>49</sup> In a pending proceeding the CAB has proposed to condition the permits of foreign route carriers to enable it to require prior approval in specific cases when the home country of the foreign carrier restricts the charter operations of United States carriers. *On-Route Charter Authority of Foreign Air Carrier Permits*, Docket 22362. See CAB Order 70-7-58 (July 13, 1970).

<sup>50</sup> Part 212 of the CAB's Economic Regulations, 14 C.F.R. Part 212 (1970). See Foreign Off-Route Charter Service Investigation, 27 C.A.B. 196 (1958).

<sup>51</sup> Each such permit, however, contains a condition that empowers the CAB to invoke a prior approval requirement. In a recent order, the CAB for the first time exercised this power against two United Kingdom charter airlines that it found had flouted its charter regulations. Donaldson Line (Air Services) Ltd. and Laker Airways Ltd., CAB Order 72-3-67 (March 20, 1972).

flights increases) must originate outside the United States.<sup>52</sup> But, the permits of foreign route carriers do not contain this restriction. All foreign air carriers serving the United States are authorized to perform affinity, single entity and most recently, travel group charters, including split charters, under the same definitions or terms as apply to American air carriers.<sup>53</sup> And foreign charter carriers (including several charter subsidiaries of foreign scheduled airlines) are also authorized to perform ITC's upon the same terms as American supplementals.<sup>54</sup>

The grant by the United States of broad charter authority to foreign route and charter airlines under long-term permits without any prior approval requirement has been premised solely upon considerations of reciprocity and comity.<sup>55</sup> But most of the foreign countries have thus far failed to grant reciprocal treatment to United States carriers. This conclusion is apparent from a recent comprehensive review in a pending CAB proceeding of the regulations and policies applied by foreign governments to charter flights by United States scheduled and supplemental airlines.<sup>56</sup> In this CAB proceeding, the examiner found that most of the foreign countries require prior approval of all charters by United States scheduled and supplemental carriers before those charters can enter the country. The examiner pointed out that the only exceptions to this requirement are Ireland, Mexico and Switzerland, which do not require prior approval for on-route charters of United States sched-

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<sup>52</sup> See *Caledonian Airways (Prestwick) Ltd.*, Foreign Permit, 38 C.A.B. 501, 504-05 (1963).

<sup>53</sup> See Regulation ER-659, adopted January 29, 1971, at 4-5.

<sup>54</sup> Most foreign route carriers are precluded by IATA charter rules from performing ITC's to or from the United States. In any event under existing CAB regulations, no United States or foreign route carrier is authorized to perform ITC's. The CAB, however, disapproved the IATA charter regulation (Resolution 045) in June 1972. CAB Order 72-6-91 (June 21, 1972). And there are pending CAB proceedings in which ITC authority is sought by IATA carriers. See *Petition of Trans World Airlines, Inc.*, CAB Docket 24727 (August 30, 1972), *Petition of KLM Royal Dutch Airlines*, CAB Docket 24780 (September 21, 1972). In addition, the recent United States-Belgium Memorandum of Understanding expressly provides for ITC operations by SABENA, the Belgian route carrier. See ITC operations by SABENA in Appendix II.

<sup>55</sup> See *Japan Airlines*, Foreign Air Carrier Permit, note 48 *supra*; *Foreign Off-Route Charter Service Investigation*, note 50 *supra*; *Caledonian Airways (Prestwick) Ltd.*, Foreign Permit, note 52 *supra*.

<sup>56</sup> *On-Route Charter Authority of Foreign Air Carrier Permits*, CAB Docket 22362.

uled air carriers, and the Bahamas and Argentina, which do not require advance approval of charter flights by American supplementals.<sup>57</sup>

The examiner further stated:

The actual practices of the foreign countries in applying the prior approval requirements show wide variations. It appears that some countries administer their regulations in a manner that imposes on serious burden beyond the burden inherent in a requirement for advance approval. Other countries, however, follow practices that, whatever their objective, tend to inhibit and restrict the development of charter services.<sup>58</sup>

The examiner cited Portugal as an example of a country requiring applications for summer charter flights to be submitted the preceding December. Japan, on the other hand, will not accept a charter application until five days before the flight is scheduled and usually does not act on the charter application until immediately before the flight is to begin.<sup>59</sup> The examiner also found: "Countries sometimes vary their requirements on an ad hoc basis, to deny permission for charters similar to those they had previously allowed . . . ."<sup>60</sup> In addition, "a significant number" of countries "apply substantive limitations and restrictions of varying severity."<sup>61</sup>

These types of restrictions are not invariably based upon considerations limited to charters. For example, the examiner found:

[C]ertain of the restrictions appear to have been imposed, not because of charter problems, but in an effort to obtain broader rights for scheduled services in negotiations with the United States. Thus, Belgium cited as the reason for its ban on supplemental carriers from the East Coast area the breakdown in its negotiations with the United States for scheduled rights for the Belgian carrier at Chicago. There is also testimony that Japan is using its control of charter landing rights as a tactic in its negotiation of rights for scheduled service with the United States.<sup>62</sup>

To be sure, there are many nations with liberal charter policies.

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<sup>57</sup> Recommended Decision of Examiner Greer M. Murphy, CAB Docket 22362 (July 13, 1971), 9-10 (footnote omitted).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> See Appendix I, *supra*.

<sup>62</sup> *Id.* at 14.

Furthermore, those countries that have adopted more restrictive policies have exercised a right granted them under the Chicago Convention for reasons deemed valid by them and in their national interest. In many cases, restrictions upon charters stem from a sincere concern that large-scale charter services may injure the scheduled flag carriers of the respective countries.

Charter travel, however, has become too important to consumers of air transportation services, to tourist interests and to governments to tolerate unilateral action by each nation often serving to frustrate the transportation policies of other nations. If, as the Chairman of the CAB recently stated, the growth of charter travel has made possible a new "era of mass tourism" with "far-reaching benefits, economic, cultural and educational,"<sup>63</sup> then nations must agree to accommodate their differing charter policies to realize these benefits.

### III. PROCEDURAL ISSUES IN REGULARIZING THE STATUS OF INTERNATIONAL CHARTER SERVICES

There is growing recognition on both sides of the Atlantic that unilateral regulation of charter services is inadequate; some form of international understanding is needed. Even IATA, while adhering to its traditional goal of restricting charter services, has recognized this need. In a letter dated February 11, 1972, to the President of ECAC, the Director General of IATA states that a "multilateral understanding on this crucial subject seems essential."<sup>64</sup> ECAC is currently attempting to devise a formula for a multilateral understanding concerning the regulation of charters.<sup>65</sup>

The recent Statement of International Air Transportation Policy sets forth the position of the United States.<sup>66</sup> This Policy Statement, the first United States policy statement on international air transportation that has dealt with charters in depth, was prepared at the direction of the President by a cabinet-level committee repre-

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<sup>63</sup> Remarks by Secor D. Browne, Chairman, Civil Aeronautics Board, before the Royal Aeronautical Society, London, March 13, 1972, at 1.

<sup>64</sup> Letter from Knut Hammerskjold, Director General of IATA to Henrik Winberg, President of ECAC, February 11, 1972 at 3.

<sup>65</sup> See Proposed Definition of and Conditions Applicable to a New Category of Non-Scheduled Operations, presented by the ECAC delegation at the Second Meeting on Transatlantic Charter Services, Paris, 21-22 March 1972 (TACS/2-DP/3).

<sup>66</sup> See note 7 *supra*.



senting all of the government agencies concerned with international air transport; the Statement was approved by the President on June 22, 1970. Although the Policy Statement deals with all aspects of international air transportation, a substantial portion of it is devoted to matters relating to charter services.

There are three aspects of the Policy Statement that should be noted: (i) its emphasis on the need to preserve and encourage charter services, (ii) its recognition of the existence of a "bulk transportation market" in which both charters and scheduled services should compete, and (iii) its recommendation that inter-governmental agreements governing charter services be established.

Concerning the preservation and promotion of charter services, the Statement is self-explanatory:

Charter services by scheduled and supplemental carriers have been useful in holding down fare and rate levels and expanding passenger and cargo markets. They offer opportunities to exploit the inherent efficiency of planeload movement and the elasticity of demand for international air transport. They can provide low-cost transportation of a sort fitted to the needs of a significant portion of the traveling public. Charter services are a most valuable component of the international air transportation system, and they should be encouraged. If it appears that there is likely to be a substantial impairment of charter services, it would be appropriate, where necessary to avoid prejudice to the public interest, to take steps to prevent such impairment.<sup>67</sup>

On the subject of the "bulk transportation market," the Statement provides:

Both scheduled carriers and supplemental carriers should be permitted a fair opportunity to compete in the bulk transportation market. We consider passengers traveling at group rates on scheduled services to be part of that market. Regulatory and promotional policies should give greater recognition to the dimensions, characteristics and needs of the bulk transportation market, as such, and less emphasis to the type of carrier that is serving that market. However, the [g]overnment should not allow enjoyment of the right

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<sup>67</sup> See note 7 *supra* at 6. A parallel comment is made regarding scheduled services. *Id.*: "Scheduled services are of vital importance to air transportation and offer services to the public which are not provided by charter services. . . . Accordingly, in any instances where a substantial impairment of scheduled services appears likely, it would be appropriate, where necessary to avoid prejudice to the public interest, to take steps to prevent such impairment."

to perform both scheduled service and charter service to result in decisive competitive advantages for scheduled carriers.<sup>68</sup>

The Statement's description of the "bulk" market in terms of the character of the traffic, rather than the type of carrier that serves it or the designation placed upon it, marks a healthy departure from the preoccupation with labels and technical rules that had previously been a central feature of charter regulation. An analysis similar to that of the Statement is found in the Edwards Report on British air transport, which finds that in today's world the traditional definition of scheduled and non-scheduled services "makes little or no sense."<sup>69</sup> The Edwards Report speaks instead of the " 'collective' demand for continuously available service" that underlies scheduled air transportation, and the "large areas of demand in which continuous availability is of little consequence and the primary concern of the customer is to secure the cheapest possible price for a particular flight" that underlie charter transportation.<sup>70</sup>

The United States Policy Statement provides with respect to international agreements to regulate charter services:

The foreign landing rights for charter services should be regularized, as free as possible from substantial restriction. To accomplish this, intergovernmental agreements covering the operation of charter services should be vigorously sought, distinct, however, from agreements covering scheduled services. In general, there should be no trade-off as between scheduled service rights and charter service rights. In negotiating charter agreements, the continuation of and the nature of the charter rights of foreign carriers will be at issue.<sup>71</sup>

This recommendation has led to a determined effort by the United States to secure international agreements covering charters.

It is puzzling to suggest, however, that agreements concerning charter services be kept "distinct" from agreements relating to scheduled services. In the long-run it may be impossible in practice to separate the two types of agreements. In terms of the Policy Statement, rigid compartmentalization of agreements covering scheduled and charter services appears to conflict with the recom-

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<sup>68</sup> See note 7 *supra* at 7.

<sup>69</sup> Edwards Report at 57.

<sup>70</sup> *Id.* at 58.

<sup>71</sup> See note 7 *supra* at 8.

mendation that both scheduled and charter airlines "should be permitted a fair opportunity to compete in the bulk transportation market"—a market that is said to include group fare traffic on scheduled flights. If scheduled and charter "bulk transportation" services constitute a single market, then all these services should appropriately be governed by the same international agreements. Unfortunately, bulk transportation services on scheduled flights are in most cases covered by existing bilateral agreements, while the charter portion of this market is not. In these circumstances, it is preferable, in the short term, to proceed with intergovernmental agreements limited to those charters as performed by all classes of carriers, than to leave charter services subject to existing *ad hoc* unilateral regulations, while a myriad of bilateral agreements covering scheduled services are sought to be amended.

Many of these same considerations apply to the broader question of whether all air transportation services between any two nations—*i.e.*, bulk and individual scheduled services and charter services—should be governed under the same agreement. All-inclusive agreements are not only desirable, but well may be compelled by practical considerations. While the United States may prefer to view scheduled and charter services independently, other nations may not. In some situations the only practical method of obtaining an agreement on charters may be by an exchange of concessions in the charter area for concessions relating to scheduled service. For example, as noted in the examiner's findings quoted above,<sup>72</sup> at least two countries have imposed restrictions on charter flights by United States airlines as a negotiating tactic aimed at securing improved route authority for their own scheduled flag carriers. Similarly, a government with a highly restrictive policy toward charters may have no real interest in entering into a charter agreement with the United States—at least not the kind of charter agreement that would carry out the objectives of the Policy Statement—unless it could thereby obtain some concession that it wanted respecting scheduled services. There is no reason why the United States should refuse to make the desired concession simply as a matter of policy. There is even less reason for the United States to refuse to discuss this kind of exchange. Nevertheless, given the existence of outstanding bilaterals covering scheduled services and the extreme difficul-

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<sup>72</sup> See note 57 *supra* at 18.

ties involved in renegotiating those agreements to include charter services, the short-run alternative is for the United States and other governments to enter into agreements limited to charters unless the basis for a broader agreement covering all air transportation services is ascertainable.

Although the Policy Statement takes no position on the question of whether "intergovernmental agreements covering the operation of charter services" should be bilateral or multilateral in character, the United States appears to be committed to the bilateral approach. ECAC, on the other hand, seems to favor some form of multilateral understanding.

The basis for the American position was explained by CAB Chairman Secor D. Browne in his recent address before the Royal Aeronautical Society in London.<sup>73</sup> His objections to the multilateral approach were purely practical in character. After analyzing each issue that would have to be dealt with in any agreement covering charter services, he concluded that none of them is capable of being handled multilaterally. Thus, he pointed out that "the matters of number of carriers and access to varying markets is something too closely identified by all governments with exchangeable benefits to be derived," and therefore "cannot be lumped into a multilateral understanding."<sup>74</sup> With respect to rate control, Chairman Browne observed that any effort to tie charter rates to the IATA fare structure or some other uniform standard "would not necessarily meet the interests of all the concerned carriers, all the concerned governments, or the concerned public; to fix rates multilaterally among governments in some other way would present other substantial difficulties, including the need for ponderous machinery."<sup>75</sup> He further noted that "regulating charter capacity on a multilateral basis would, with regard to any specific binational market, involve extra governments without valid interests," that "government interests, such as promoting tourism, vary from country to country," and that "[m]arket characteristics differ among various pairs of points."<sup>76</sup> Moreover, the Chairman stated with respect to the question of preventing impairment of essential scheduled services that "the level

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<sup>73</sup> See note 63 *supra*.

<sup>74</sup> See note 63 *supra* at 10.

<sup>75</sup> *Id.* at 11.

<sup>76</sup> *Id.*

of services between any pair of points is the concern of only two governments" and therefore must be handled bilaterally.<sup>77</sup> Lastly, he noted that there are still wide differences among governments on the question of charter definitions; any effort to achieve multilateral agreement "would probably be at the cost of further delay in the accomplishment of needed bilateral understandings and increased tourism business."<sup>78</sup>

In light of past experience, the United States seems justified in favoring charter bilateral rather than multilateral agreements. Scheduled services are regulated bilaterally, and the effort that was made in 1944 at Chicago to achieve a multilateral agreement on scheduled services was unsuccessful. The Paris Agreement of 1956, while multilateral, was reached at a time when charters were a less sensitive issue and is extremely limited in scope.<sup>79</sup> Thus, to suppose that a comprehensive multilateral agreement could be reached on charters, particularly since there are tremendous differences among countries in the field of charter policy, would be unrealistic. Admittedly, the ECAC governments have occasionally been able to reach substantial accord on certain charter policies; but as directed to transatlantic charters, these have been in the past almost exclusively restrictive in character.<sup>80</sup> What the United States seeks to achieve through international charter agreements, however, is not more restrictions but the encouragement of charter services. This goal will be difficult enough to achieve on a bilateral basis. It is likely to be even more difficult to achieve—at least at the present time—through any multilateral agreement.

#### IV. RECOMMENDED PROVISIONS FOR A CHARTER BILATERAL

Since the issuance of the United States Policy Statement, the United States has commenced negotiations with several countries to reach bilateral agreements governing charter air service.<sup>81</sup> While it is impossible to forecast the outcome of future negotiations, it is useful to consider the type of agreement that would best serve

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<sup>77</sup> *Id.* at 12.

<sup>78</sup> *Id.*

<sup>79</sup> See note 42 *supra*.

<sup>80</sup> An example is the minimum price restriction that ECAC governments have imposed on transatlantic ITC's.

<sup>81</sup> The negotiations with Belgium are the first to bear fruit, see text following note 89 *infra*.

the varied interests of consumers, airlines, suppliers of tourist services and governments. Since it seems clear, for the reasons already stated, that meaningful agreements can most readily be achieved at the present time on a bilateral basis, this discussion will deal with bilateral agreements.

The first objective of any bilateral agreement on charters should be the elimination of any requirement for the advance approval of flights. The agreement should permit charter flights to operate between the signatory countries under the same procedures as scheduled flights.

The designation of charter-only and scheduled carriers authorized to perform charter services under the bilaterals should be left to the unilateral determination of each signatory government similar to the existing bilaterals governing scheduled service. The matter of carrier selection has traditionally been considered to be a sovereign right of each nation; there is no reason why this principle should not be equally applicable in the charter field. Of course, the carriers of each country would be required to make formal application for operating rights to the government of the other country and would have to comply with all applicable laws of that government relating to the operation and navigation of aircraft.

The most difficult issues to resolve are undoubtedly those dealing with rate and capacity control, charter definition and the prevention of impairment of essential scheduled services. It is in these areas that the conflicting charter policies of different nations will have to be reconciled. Those governments that have traditionally imposed severe restrictions on charter transportation will seek to incorporate those restrictions into any bilateral agreement, while those countries with a liberal attitude toward charters will resist restrictions.

It is clear that the United States will not enter into any bilateral agreement that is highly restrictive and aims at containment of charter services. If the United States did so, it would violate the principles of the Policy Statement. This does not mean, however, that the United States is unconcerned about the preservation of scheduled services. On the contrary, the Policy Statement emphasizes the "vital importance" of scheduled transportation and states that steps should be taken, when appropriate, to prevent "substantial impairment" of scheduled services.<sup>82</sup>

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<sup>82</sup> See note 7, *supra* at 6.

Recognition of the need to protect scheduled services against substantial impairment, however, is not the same as assuring their profitability at the capacity levels the scheduled carriers choose to operate. Only the *essential* level of scheduled service is entitled to protection. The United States Department of Transportation, which played a central role in drafting the Policy Statement, has adhered to this view. In a recent submission to the CAB, the Department stated the point unequivocally:<sup>83</sup>

[E]ven assuming some scheduled service is being impaired by charter services, the question is whether that impairment is causing 'prejudice to the public interest.' . . . Where scheduled operators operate capacity substantially greater than existing demand, it is neither in their interest nor in the interest of the public to maintain that condition, much less to protect it from charter operators."<sup>84</sup>

Similarly, the Edwards Report states that it may be necessary in some cases "to distinguish between those scheduled services which are essential and those which are desirable."<sup>85</sup>

Under this approach, provisions for capacity or rate controls would be unnecessary and inappropriate.<sup>86</sup> Certainly, there is no reason to assume initially that restrictions of this kind are essential in all situations to prevent impairment of vital scheduled services. In the transatlantic market, for example, in which affinity charter services have not been subject to capacity and rate controls, there is no evidence that the rapid growth of these services over the past decade has impaired vital scheduled services. On the contrary,

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<sup>83</sup> Comments of the Department of Transportation at 6, CAB Docket 23055 (Non-Affinity Charter Rule Making, May 6, 1971).

<sup>84</sup> To determine the essential level of scheduled service, the Department of Transportation has suggested taking "the number of persons using scheduled service at normal fares in an acceptable base year plus some proportion of the number of downward diverted discount fare passengers," thereby ascertaining the number who "have a vital need for the type of service that can only be provided by scheduled carriers." Significantly, using this method with 1968 transatlantic traffic data for United States scheduled airlines, DOT determined that those airlines were operating fifteen transatlantic round-trips per day above the twenty-two round-trips found to constitute essential service. *Id.* at 9.

<sup>85</sup> Edwards Report at 59.

<sup>86</sup> The term rate controls means minimum price restrictions aimed at protecting scheduled services—such as the ECAC restriction on ITC prices—without regard to the reasonableness of the rate when considered on its own merits. Wholly apart from the impairment issue, a charter bilateral should appropriately contain the usual kind of rate article requiring that the rates charged by each carrier shall be reasonable.

scheduled traffic has continued to grow at a very healthy rate during the same period,<sup>87</sup> and the capacity being offered, if anything, substantially exceeds the level that can be deemed essential.<sup>88</sup> An individual traveler seeking scheduled service between points in this market has a wide choice of convenient flights at all times of day and in all seasons of the year. Admittedly, the market has become increasingly competitive—but competition is not impairment nor is it contrary to the public interest.

To be sure, it is possible to imagine situations in which rate or capacity controls might be needed to prevent impairment of essential scheduled services. But these controls are clearly not needed in all markets or in all circumstances. A bilateral agreement should provide for *ex post facto* consultations in the event that one of the signatory governments believes that restrictions on the charter rates or charter capacity offered by carriers of the other country are necessary to prevent impairment of essential scheduled services provided by its own flag carriers. As is usual in bilaterals, the agreement could also provide for arbitration in the event the parties themselves could not resolve the issue. In short, capacity or rate restrictions would be imposed only when it is demonstrated that they are needed to avoid impairment of essential scheduled services, and then only to the extent required to meet that specific need. This format would be consistent with the United States Policy Statement and with the view that absent other overriding considerations, low-cost charter services should be encouraged.

The other major issue that would have to be resolved in a bilateral agreement on charters would be the definition of charter service itself. In view of the differing regulatory policies of various countries, the two governments concerned may not be able to agree on a single charter definition. In those situations neither party is likely to agree that charter traffic originating in its homeland must conform to the other party's concept of what constitutes charter service.

An equitable solution to this problem would be to provide generally that the agreement covers charter or group (but not in-

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<sup>87</sup> In the 1962-71 period, United States flag carriers experienced a 17% annual growth rate in their transatlantic scheduled traffic, and the annual rate of growth of all IATA transatlantic scheduled traffic was 14%. (IATA Reports).

<sup>88</sup> See note 84 *supra*.



dividually-ticketed) travel and further that each country's charter definition will govern all flights originating in that country. This approach would avoid the necessity of either side having to capitulate completely to the other party's charter definition; it would permit each party to change or experiment with its charter rules during the term of the agreement. Indeed, it is appropriate for each government to determine how its own citizens will be permitted to travel, and how the total air traffic originating in its own country will be allocated among different classes of carriers or modes of carriage.

As in the case of capacity and rate controls, there is no basis for assuming that this approach would lead to impairment of vital scheduled services, especially since the charter definitions of all countries are normally designed to protect against such impairment. To guard against the possibility of impairment, however, the agreement could provide that if it appeared that a party's charter definition was so broad that it resulted in substantial impairment of the scheduled services provided by the other party's flag carriers, then the other party could request consultations and arbitration.

The kind of bilateral agreement described above will not be satisfactory to those who view all charter services as a threat to the survival of the scheduled airline industry, and who believe that the sole purpose of charter regulations should be to totally insulate the scheduled carriers against that threat. But this view is rapidly declining throughout the world. The old system of air travel, in which scheduled services built around the needs of business travelers were predominant, cannot meet the needs of this new age. What is needed now is a balanced system of air transportation, in which both scheduled and charter services must play an important role, and in which charter services have an assured status by virtue of international agreements.

#### V. POSTSCRIPT—THE UNITED STATES-BELGIUM MEMORANDUM OF UNDERSTANDING

The three-year Memorandum of Understanding between the United States and Belgium, signed October 17, 1972, will for the first time provide assured legal status for passenger charter services between the United States and a foreign country. While this Memorandum of Understanding lacks much of the formal apparatus of the usual bilateral agreement, and indeed states that "a bilateral

non-scheduled air services agreement is not possible at this time,"<sup>89</sup> it is in many substantial respects the equivalent of a bilateral agreement.

The Memorandum sets forth the two countries' "mutual adherence to certain basic regulatory principles" and describes "the regulatory regimes each will apply to operations of the other's carriers over the foreseeable period extending from January 1, 1973 through December 31, 1975."<sup>90</sup> Among the "Mutually Recognized Principles" are that "passenger charter air services provide . . . important opportunities for promoting cultural exchange, tourism and air commerce," and that the qualification of particular air carriers and the operating conditions for charter services "should be in conformity with the Chicago Convention, its pertinent annexes, and equivalent to the treatment accorded to the parties' designated scheduled carriers under Articles II, III, and VI" of the United States-Belgium bilateral agreement.<sup>91</sup> The bilateral provisions referred to deal with inauguration of air services, airport and related charges, adherence to air navigation laws and regulations and the requirement of substantial ownership and effective control of air carriers by nationals of the contracting states.<sup>92</sup>

Importantly, the Memorandum provides that passenger charter operations "shall be permitted *without advance approval of flights* subject only to reasonable notice requirements."<sup>93</sup> It also forbids discrimination "among carriers of the other party," thereby ending the discriminatory treatment that supplemental carriers have received in the past.

With respect to the potential impact of charters upon scheduled services, the Memorandum states that "[w]hile passenger charter air traffic should not be permitted to cause substantial impairment of scheduled air services, quota limits on the volume of passenger charter air traffic are not acceptable for this purpose."<sup>94</sup> Nor is

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<sup>89</sup> *Memorandum to United States-Belgian Understanding on Civil Aviation Charter Services*, October 17, 1972, — U.S.T. —, T.I.A.S. No. — (hereinafter cited as *Understanding*) appearing as Appendix II *supra*.

<sup>90</sup> *Id.*

<sup>91</sup> *Principles* in *Understanding*.

<sup>92</sup> *Articles of Agreement Between the United States and Belgium*, signed at Brussels, April 5, 1946.

<sup>93</sup> *Memorandum and Principles*, par. 5 in *Understanding*.

<sup>94</sup> *Id.*, *Principles*, par. 3.

there any provision for rate controls. Instead, "[t]he parties shall deal with this question by establishing and enforcing reasonable passenger charter regulations."<sup>95</sup> "Possible difficulties" arising from charter operations under the agreement "will be discussed between the parties in the shortest possible time."<sup>96</sup>

The two annexes to the Memorandum, which describe "the regulatory regime" each party will apply during the three-year term of the agreement, are intended to "provide a sound and secure foundation for passenger charter air service for the foreseeable future . . . ."<sup>97</sup> In the first annex, the United States agrees that it will continue the on-route charter authority of the Belgian designated route carrier, SABENA, "for all charter types as are or may be authorized to foreign scheduled airlines (including travel group charters)" and treat the carrier's off-route charter operations as it did prior to 1970, when the Belgian ban on East Coast-Belgium charters by American supplementals was imposed.<sup>98</sup> SABENA will also be authorized to perform inclusive tour charters—a form of authority not presently held by any other United States or foreign scheduled carrier.<sup>99</sup> In addition, the United States agrees to continue in force the foreign air carrier permit recently granted to Pomair, a Belgian charter airline.<sup>100</sup>

In the second annex, Belgium agrees to permit "all United States carriers certificated to provide passenger charter service to and from Belgium . . . to pick up and set down in Belgium" charter traffic between the two countries, including flights that serve intermediate countries or points beyond Belgium.<sup>101</sup> This provision covers "all charter type traffic as is or may be authorized by the Civil Aeronautics Board (including travel group charters)."<sup>102</sup> In

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*, *Principles*, par. 4.

<sup>97</sup> *Id.*, *Principles*, par. 6.

<sup>98</sup> *Id.*, *Annex 1*, par. 1, 2.

<sup>99</sup> *Id.*, *Annex 1*, par. 4. See text at note 54 *supra*.

<sup>100</sup> *Id.*, *Annex 1*, par. 5. See Pomair, N.V., CAB Order 72-6-111 (June 27, 1972).

<sup>101</sup> *Id.*, *Memorandum, Annex 2*, par. 1. At present, five United States supplemental carriers (Capitol Airways, Overseas National Airways, Saturn Airways, Trans International Airlines and World Airways) and one scheduled carrier (Pan American World Airways) hold effective certificates authorizing United States-Belgium passenger charter service.

<sup>102</sup> *Id.* The reference to travel group charters is significant because this new

addition, Belgium agrees that the American carriers will be allowed to perform Fifth Freedom passenger charters between Belgium and points in North America outside the United States (when authorized by authorities of the third country).<sup>103</sup>

In sum, the United States-Belgium agreement marks a breakthrough in achieving the goal of the Statement of International Air Transportation Policy of the United States that "foreign landing rights for charter services should be regulatized, as free as possible from substantial restriction."<sup>104</sup>

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form of charter has only recently been adopted by the Civil Aeronautics Board (and, in slightly different form, by the United Kingdom) and is likely to expand substantially the availability of charter services. See Regulation SPR-61, adopted September 27, 1972, 37 Fed. Reg. 20808.

<sup>103</sup> *Id.*, Annex 2, par. 2.

<sup>104</sup> See note 7 *supra* at 8.

APPENDIX I.  
INTERNATIONAL CHARTER RESTRICTIONS

COUNTRY	COMPLETE BANS		VARIOUS RESTRICTIONS				FIRST REFUSAL RIGHTS
	ITC	Split Charters	Both	Plane Load	Affinity Charters	ITC	
				Fare	Volume	Fare <sup>i</sup>	Volume
Australia			X	X <sup>b</sup>			X <sup>o</sup>
Belgium			X <sup>p</sup>		X <sup>p</sup>	X	
Bermuda			X		X <sup>t</sup>		
Brazil	X						X
Canada							X <sup>ao</sup>
Denmark			X <sup>a</sup>				
France		X			X <sup>e</sup>	X	X <sup>m</sup>
Germany		X				X	X <sup>i</sup>
Ireland							X <sup>t</sup>
Israel			X <sup>a</sup>				X <sup>o</sup>
Italy			X				
Japan			X		X <sup>o</sup>		X <sup>o</sup>
Mexico				X <sup>d</sup>			X
Norway			X <sup>a</sup>				
Portugal					X <sup>b</sup>	X	
Sweden			X <sup>a</sup>				
United Kingdom						X	X <sup>k</sup>
Venezuela							X

## APPENDIX I CONTINUED

- <sup>a</sup> An exception is intra-European inclusive tour charters.
- <sup>b</sup> Will not permit an affinity charter if the price is less than 55 per cent of the applicable IATA economy fares.
- <sup>c</sup> Charter fares must bear a reasonable relationship to the service offered.
- <sup>d</sup> Charter rates must be approved by its Director General of Tariff.
- <sup>e</sup> Allowed only seventy-five affinity charters from the United States in 1970 with some exception for Osaka Exposition.
- <sup>f</sup> Bars all affinity charters during the four to six week Easter Season.
- <sup>g</sup> Allows ten affinity charters for all United States carriers to Tahiti. Bans all charters originating on the West Coast.
- <sup>h</sup> Limits total United States supplemental carriers flights to five per cent of number of scheduled flights by scheduled carriers between the United States and Portugal the previous year.
- <sup>i</sup> Most European countries allowing ITC's require that the charge not be less than the contract bulk inclusive tour fares established by scheduled international carriers through IATA for their own services.
- <sup>j</sup> Quota of thirty flights.
- <sup>k</sup> Quota of ninety flights during peak period.
- <sup>l</sup> Quota of sixty flights across the Atlantic.
- <sup>m</sup> Quota of fifty flights to France; ten flights to Tahiti.
- <sup>n</sup> On charters originating in Canada.
- <sup>o</sup> First refusal rights also given to foreign scheduled carriers.
- <sup>p</sup> Ban on all charter flights by U.S. supplementals from East Coast area.
- <sup>q</sup> Ban on all charters including payload affinity charters.

Source: Recommended Decision of Examiner Greer M. Murphy, On-Route Charter Authority of Foreign Air Carrier Permits, CAB Docket 22362, served July 13, 1971.

## APPENDIX II.

UNITED STATES-BELGIAN UNDERSTANDING ON CIVIL AVIATION  
CHARTER SERVICES<sup>1</sup>

Representatives of the United States and Belgium today signed in Brussels a Memorandum of Understanding on the regulation of passenger charter air services. The Understanding stabilizes an environment which will permit United States and Belgian airlines to conduct charter flights without arbitrary restraints, including generally the need for prior approval, and sets forth the regulatory regimes which each side will apply to charter operations of the other's airlines. The Understanding is effective from January 1, 1973, through December 31, 1975. One effect of the Understanding is to restore to United States supplemental airlines authority to operate charter flights between the northeast quadrant of the United States and Belgium.

A copy of the Understanding follows.

## MEMORANDUM OF UNDERSTANDING

Representatives of the Government of the United States of America and the Government of Belgium have discussed the regulation of passenger charter air services between their territories, and have concluded that a bilateral nonscheduled air services agreement governing such services is not possible at this time. This memorandum sets forth mutual adherence to certain basic regulatory principles which emerged from the discussion and describes the regulatory regimes each will apply to operations of the other's carriers over the foreseeable period extending from January 1, 1973 through December 31, 1975.

*Mutually Recognized Principles*

After a thorough review of their regulatory policies, the parties recognize certain common elements important to both their governments.

1. Passenger charter air services provide the citizens of their countries important opportunities for promoting cultural exchange, tourism and air commerce.

2. The qualification of particular carriers to perform passenger charter air services, and the operating conditions applicable to the operation, navigation, servicing and handling of aircraft engaged in such services should be in conformity with the Chicago Convention, its pertinent annexes, and equivalent to the treatment accorded to the parties' designated scheduled carriers under Articles II, III, V, and VI of the bilateral Air Transport Services Agreement between Belgium and the United States, signed at Brussels April 5, 1946.

3. While passenger charter air traffic should not be permitted to cause substantial impairment of scheduled air services, quota limits on the volume of passenger charter air traffic are not acceptable for this purpose. The parties shall deal with this question by establishing and enforcing reasonable passenger charter regulations.

4. Possible difficulties arising from the regulation, operation or volume of passenger charter air service will be discussed between the parties in the shortest possible time.

5. Unless otherwise specified in the annexes hereto, no discrimination should be permitted against a carrier or among carriers of the other party performing operations within the regulatory framework annexed to this memorandum and such operations shall be permitted without advance approval of flights subject only to reasonable notice requirements.

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<sup>1</sup> The following is the Memorandum and Introduction as set forth in the State Department News Release No. 264, dated October 17, 1972.

6. To provide a sound and secure foundation for passenger charter air service for the foreseeable future, there is set forth in the attached annexes the regulatory regime each party intends to apply from January 1, 1973 to December 31, 1975. Each party acknowledges its satisfaction with the policies of the other, and confirms there will be no change in these regimes within the terms of the annexes, unless otherwise understood between them.

Done at Brussels, October 17, 1972

For the United States of America: Ambassador Robert Strausz-Hupe

For Belgium: Minister of Communications and Transport, Fernand Delmotte

#### ANNEX 1

##### UNITED STATES REGULATORY POLICY

In the exercise of their regulatory functions, the United States civil aviation authorities for the period extending from January 1, 1973 through December 31, 1975, will:

1. Continue the existing on-route charter authority of the Belgian designated route carrier for all charter types as are or may be authorized to foreign scheduled airlines (including travel group charters).

2. Treat off-route charter operations of the Belgian designated route carrier in a manner consistent with the treatment accorded them prior to 1970.

3. Authorize the Belgian designated route carrier to operate under paragraphs 1 and 2, Inclusive Tour charters authorized by Civil Aeronautics Board rules.

4. Authorize the Belgian designated route carrier to lease a Belgian registered aircraft with crew from another Belgian certificated carrier for operations under paragraphs 1, 2, and 3 in accordance with existing Civil Aeronautics Board rules and procedures.

5. Continue in force the other charter foreign air carrier permit currently held by a Belgian carrier.

6. Accord liberal treatment under existing procedures to applications of other Belgian carriers for limited and infrequent charter flights to and/or from the United States.

#### ANNEX 2

##### BELGIAN REGULATORY POLICY

In the exercise of their regulatory functions, the Belgian civil aviation authorities, for the period extending from January 1, 1973 through December 31, 1975, will:

1. Permit all United States carriers certificated to provide passenger charter service to and from Belgium to exercise the right to pick up and set down in Belgium such passenger charter traffic moving between a point or points in the United States and a point or points in Belgium (one way or roundtrip, nonstop or via intermediate countries, as well as to or from points beyond or behind) for all charter type traffic as is or may be authorized by the Civil Aeronautics Board (including travel group charters).\*

2. Continue to permit the same operations by the same carriers as in paragraph 1 above when the traffic is moving in either direction between Belgium and a point or points in North America outside the United States and such charter flights are authorized by the competent authorities of the third country.

3. Grant liberal treatment to applications of other Civil Aeronautics Board authorized United States carriers for limited and infrequent charter flights to and/or from Belgium.

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\* Where authority to uplift a particular Belgium-originating charter flight composed of third-country residents has been denied by another European authority, the Belgian authorities reserve the right to require prior approval.



